

Hearing Date and Time: September 14, 2011 at 10:00 a.m. (Prevailing Eastern Time)
Objection Date and Time: September 7, 2011 at 4:00 p.m. (Prevailing Eastern Time)

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*[Also filed by Richard S. Fuld, Jr., Christopher
M. O'Meara, Joseph M. Gregory, Erin Callan, Ian T.
Lowitt, David Goldfarb, Herbert McDade, III,
Thomas Russo and Mark Walsh]*

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re	: Chapter 11 Case No.
LEHMAN BROTHERS HOLDINGS INC., et al.,	: 08-13555 (JMP)
Debtors.	: (Jointly Administered)
-----X	

**NOTICE OF INSURED PERSONS' MOTION, PURSUANT TO
SECTION 362 OF THE BANKRUPTCY CODE, FOR AN ORDER
MODIFYING THE AUTOMATIC STAY TO ALLOW SETTLEMENT
PAYMENT UNDER DIRECTORS AND OFFICERS INSURANCE POLICY
TO SETTLE THE NEW JERSEY ACTION**

PLEASE TAKE NOTICE that a hearing on the annexed Motion of Richard S.
Fuld, Jr., Christopher M. O'Meara, Joseph M. Gregory, Erin Callan, Ian T. Lowitt, David
Goldfarb, Herbert H. McDade, III, Thomas Russo, Mark Walsh, Michael Ainslie, John F. Akers,
Roger S. Berlind, Thomas H. Cruikshank, Marsha Johnson Evans, Sir Christopher Gent, Roland
A. Hernandez, Henry Kaufman and John D. Macomber (collectively, the "Insured Persons"), for

relief from the automatic stay, to the extent applicable, to permit the third-party insurers of Lehman Brothers Holdings Inc. ("LBHI") and its affiliated debtors in the above-referenced chapter 11 cases (the "Debtors" and, collectively with their non-debtor affiliates, "Lehman") to make payments in connection with a certain settlement agreement, all as more fully described in the Motion, will be held before the Honorable James M. Peck, United States Bankruptcy Judge, at the United States Bankruptcy Court, Alexander Hamilton Customs House, Courtroom 601, One Bowling Green, New York, New York 10004 (the "Bankruptcy Court"), on **September 14, 2011 at 10:00 a.m. (Prevailing Eastern Time)** (the "Hearing").

PLEASE TAKE FURTHER NOTICE that objections, if any, to the Motion shall be in writing, shall conform to the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and the Local Rules of the Bankruptcy Court for the Southern District of New York, shall set forth the name of the objecting party, the basis for the objection and the specific grounds thereof, shall be filed with the Bankruptcy Court electronically in accordance with General Order M-242 (which can be found at www.nysb.uscourts.gov) by registered users of the Bankruptcy Court's case filing system and by all other parties in interest, on a 3.5 inch disk, preferably in Portable Document Format (PDF), WordPerfect, or any other Windows-based word processing format (with two hard copies delivered directly to Chambers), and shall be served upon: (i) the chambers of the Honorable James M. Peck, One Bowling Green, New York, New York 10004, Courtroom 601; (ii) Dechert LLP, 1095 Avenue of the Americas, New York, New York, 10036, Attn: Adam J. Wasserman, Esq., attorneys for Michael Ainslie, John F. Akers, Roger S. Berlind, Thomas H. Cruikshank, Marsha Johnson Evans, Sir Christopher Gent, Roland A. Hernandez, Henry Kaufman and John D. Macomber; (iii) Allen & Overy LLP, 1221 Avenue of the Americas, New York, New York, 10020, Attn: Patricia M. Hynes, Esq., attorneys for Richard S.

Fuld, Jr.; (iv) Sills Cummis & Gross, LLP, 30 Rockefeller Plaza, New York, New York, 10112, Attn: Jeffrey J. Greenbaum, Esq., attorneys for Christopher M. O'Meara, Joseph M. Gregory, Ian T. Lowitt, David Goldfarb, Herbert McDade, III and Thomas Russo; (v) Proskauer Rose, 11 Times Square, New York, New York, 10036, Attn: Robert J. Cleary, Esq., attorneys for Erin Callan; (vi) Spears & Imes LLP, 51 Madison Avenue, New York, New York, 10010, Attn: David Spears, Esq., attorneys for Mark Walsh; (vii) Weil Gotshal & Manges LLP, 767 Fifth Avenue, New York, New York 10153, Attn: Richard P. Krasnow, Esq., attorneys for the Debtors; (viii) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st Floor, New York, New York 10004, Attn: Tracy Hope Davis, Esq., Andy Velez-Rivera, Esq., Paul Schwartzberg, Esq., Brian Masumoto, Esq., and Linda Riffkin, Esq.; (ix) Milbank, Tweed, Hadley & McCloy LLP, 1 Chase Manhattan Plaza, New York, New York 10005, Attn: Dennis F. Dunne, Esq., Evan Fleck, Esq. and Dennis O'Donnell, Esq., attorneys for the official committee of unsecured creditors appointed in these cases; (x) Walker Wilcox Matousek LLP, 225 W. Washington Street, Chicago, Illinois 60606, Attn: James Huberty, Esq. and Paul F. Matousek, Esq., attorneys ACE Bermuda Insurance Ltd.; and (xi) Bailey Cavalieri LLC, One Columbus, 10 West Broad St. Suite 2100, Columbus, Ohio 43215, Attn: Thomas E. Geyer, Esq. and Robert Eblin, Esq., attorneys for St. Paul Mercury Insurance Company, so as to be so filed and received by no later than **September 7, 2011 at 4:00 p.m. (Prevailing Eastern Time)** (the "Objection Deadline").

PLEASE TAKE FURTHER NOTICE that if an objection to the Motion is not received by the Objection Deadline, the relief requested shall be deemed unopposed, and the Bankruptcy Court may enter an order granting the relief sought without a hearing.

PLEASE TAKE FURTHER NOTICE that objecting parties are required to attend
the Hearing, and failure to appear may result in relief being granted or denied upon default.

Dated: August 24, 2011
New York, New York



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Attorneys for Mark Walsh

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re	:	Chapter 11 Case No.
	:	
LEHMAN BROTHERS HOLDINGS INC., <i>et al.</i> ,	:	08-13555 (JMP)
	:	
Debtors	:	(Jointly Administered)
	:	
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**[PROPOSED] ORDER GRANTING INSURED PERSONS' MOTION, PURSUANT TO
SECTION 362 OF THE BANKRUPTCY CODE, FOR AN ORDER
MODIFYING THE AUTOMATIC STAY TO ALLOW SETTLEMENT
PAYMENT UNDER DIRECTORS AND OFFICERS INSURANCE POLICY
TO SETTLE THE NEW JERSEY ACTION**

Upon the motion, dated August 24, 2011 (the "Motion"), of Richard S. Fuld, Jr., Christopher M. O'Meara, Joseph M. Gregory, Erin Callan, Ian T. Lowitt, David Goldfarb, Herbert H. McDade, III, Thomas Russo, Mark Walsh, Michael Ainslie, John F. Akers, Roger S. Berlind, Thomas H. Cruikshank, Marsha Johnson Evans, Sir Christopher Gent, Roland A. Hernandez, Henry Kaufman and John D. Macomber (collectively, the "Insured Persons"), pursuant to section 362(d) of title 11 to the United States Code (the "Bankruptcy Code") and Rule 4001(a)(3) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for an order modifying the automatic stay provided for in section 362(a) of the Bankruptcy Code, to the extent applicable, to allow the Excess Policy Insurers¹ to make a payments in connection with the terms of a settlement agreement and supplemental stipulation (the "Settlement Agreement") relating to the action *The State of New Jersey, Department of Treasury, Division of Investment v. Fuld et al.*, No. 10 Civ. 05201 (LAK), as more fully described in the Motion; and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28

¹ Capitalized terms not defined herein shall have the meaning ascribed to them in the Motion.

U.S.C. §§ 157 and 1334 and the Standing Order M-61 Referring to Bankruptcy Judges for the Southern District of New York Any and All Proceedings Under Title 11, dated July 10, 1984 (Ward, Acting C.J.); and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided in accordance with the procedures set forth in the second amended order entered on June 17, 2010, governing case management and administrative procedures for these cases [Docket No. 9635] to (i) the United States Trustee for the Southern District of New York; (ii) the attorneys for the Debtors; (iii) the attorneys for the Official Committee of Unsecured Creditors; (iv) attorneys for New Jersey; (v) the Securities and Exchange Commission; (vi) the Internal Revenue Service; (vii) the United States Attorney for the Southern District of New York; (viii) all parties who have requested notice in these chapter 11 cases; and (ix) attorneys for ACE Bermuda and St. Paul Mercury, and it appearing that no other or further notice need be provided; and a hearing having been held to consider the relief requested in the Motion; and the Court having found and determined that the relief sought in the Motion is in the best interests of the Debtors, their estates and creditors, and all parties in interest and that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; that modifying the automatic stay will not harm the Debtors' estates, and that any rights the Debtors have to the proceeds are contractually subordinated to the rights of the individual Insureds pursuant to the priority of payments clause; and after due deliberation and sufficient cause appearing therefor, it is

ORDERED that the Motion is granted; and it is further

ORDERED that pursuant to sections 105(a) and 362(d) of the Bankruptcy Code, the automatic stay, to the extent applicable, is hereby modified to, and without further order of this Court, allow the Excess Policy Insurers to pay the Settlement Amount provided for in the Settlement Agreement on behalf of the Insured Persons in accordance with the terms of the Excess Insurance Policies; and it is further

ORDERED that the Insured Persons and the Debtors are authorized to execute all documentation necessary to allow the Excess Policy Insurers to fund the Settlement Amount on behalf of the Insured Persons pursuant to the Settlement Agreement; and it is further

ORDERED that nothing in this Order shall modify, alter or accelerate the rights and obligations of the Excess Policy Insurers, the Debtors or the Insured Persons provided for under the terms and conditions of the Excess Insurance Policies; and it is further

ORDERED that all parties to the Excess Insurance Policies reserve all rights and defenses with respect to the Excess Insurance Policies that they would otherwise have; and it is further

ORDERED that nothing in this Order shall constitute a determination that the proceeds of the Excess Insurance Policies are property of the Debtors' estates, and the rights of all parties in interest to assert that the proceeds of the Excess Insurance Policies are, or are not, property of the Debtors' estates are hereby reserved; and it is further

ORDERED that stay provided by Bankruptcy Rule 4001(a)(3) is waived; and it is further

ORDERED that this Court retains jurisdiction with respect to all matters arising
from or related to the implementation of this Order.

Dated: September ___, 2011
New York, New York

UNITED STATES BANKRUPTCY JUDGE

14207299.1.LITIGATION

Hearing Date and Time: September 14, 2011 at 10:00 a.m. (Prevailing Eastern Time)
Objection Date and Time: September 7, 2011 at 4:00 p.m. (Prevailing Eastern Time)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re	:
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LEHMAN BROTHERS HOLDINGS INC., et al.,	:
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Debtors.	:
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Chapter 11 Case No.
08-13555 (JMP)
(Jointly Administered)

**INSURED PERSONS' MOTION, PURSUANT TO
SECTION 362 OF THE BANKRUPTCY CODE, FOR AN ORDER
MODIFYING THE AUTOMATIC STAY TO ALLOW SETTLEMENT
PAYMENT UNDER DIRECTORS AND OFFICERS INSURANCE POLICY
TO SETTLE THE NEW JERSEY ACTION**

TO THE HONORABLE JAMES M. PECK
UNITED STATES BANKRUPTCY JUDGE:

Richard S. Fuld, Jr., Christopher M. O'Meara, Joseph M. Gregory, Erin Callan,
Ian T. Lowitt, David Goldfarb, Herbert H. McDade, III, Thomas Russo, Mark Walsh, Michael
Ainslie, John F. Akers, Roger S. Berlind, Thomas H. Cruikshank, Marsha Johnson Evans, Sir
Christopher Gent, Roland A. Hernandez, Henry Kaufman and John D. Macomber (collectively,

the “Insured Persons”), former and current officers and directors of Lehman Brothers Holdings Inc. (“LBHI”) and/or its affiliated debtors in the above-referenced chapter 11 cases (the “Debtors” and, collectively with their non-debtor affiliates, “Lehman”), file this motion and respectfully represent:

Preliminary Statement

1. On nine prior occasions, the Court has modified the automatic stay provided for under section 362(a) of title 11 of the United States Code (the “Bankruptcy Code”), to the extent applicable, to remove any impediments to payment by certain of the Debtors’ insurers of directors and officers coverage of a judgment, settlement amounts or defense costs or fees that current or former directors, officers, and employees of the Debtors incurred or were incurring as defendants in ongoing lawsuits, arbitration proceedings, and regulatory or other investigations.¹ By this Motion, the Insured Persons seek identical relief to assure ACE Bermuda Insurance Ltd. subscribing to policy number LEHM-11742D (“ACE Bermuda”), the Debtors’ sixth level excess insurer under the Debtors’ 2007-2008 directors’ and officers’ liability insurance program or, if ACE Bermuda has exhausted its applicable limits of liability, St. Paul Mercury Insurance Company subscribing to policy number 590CM2698 (“St. Paul Mercury”);

¹ See Orders dated March 25, 2009 [Docket No. 3220] (modifying the automatic stay to allow advancement of defense costs with respect to XL Specialty Insurance Company); November 23, 2009 [Docket No. 5906] (modifying the automatic stay to allow advancement of defense costs with respect to Federal Insurance Company); December 17, 2009 [Docket No. 6297] (modifying the automatic stay to allow payment of settlement amounts by XL Specialty Insurance Company and Federal Insurance Company); August 20, 2010 [Docket No. 10945] (modifying the automatic stay to allow advancement of defense costs with respect to Continental Casualty Company, Certain Underwriters at Lloyd’s, London and London Market Company, and U.S. Specialty Insurance Company (HCC)); November 18, 2010 [Docket No. 12896] (modifying the automatic stay to allow advancement of defense costs with respect to Zurich American Insurance Company, ACE Bermuda Insurance Ltd, St. Paul Mercury Insurance Company, XL Specialty Insurance Company and Federal Insurance Company); November 18, 2010 [Docket No. 12895] (modifying the automatic stay to allow payment of settlement amounts by Certain Underwriters at Lloyd’s, London and London Market Company); January 13, 2011 [Docket No. 13929] (modifying the automatic stay to allow payment of settlement amount by U.S. Specialty Insurance Company and Zurich American Insurance Company); March 23, 2011 [Docket No. 15277] (modifying the automatic stay to allow payment of settlement amounts by Zurich American Insurance Company); July 21, 2011 [Docket No. 18691] (modifying the automatic stay to allow payment of an arbitral award by Zurich American Insurance Company and ACE Bermuda Insurance Ltd.) (collectively, the “Prior Stay Orders”).

the Debtors' seventh level excess insurer under the Debtors' 2007-2008 directors' and officers' liability insurance program or, if St. Paul Mercury has exhausted its applicable limits of liability, the appropriate subsequent insurer or insurers that are paying under the Debtors' 2007-2008 directors' and officers' liability insurance program (together with ACE Bermuda and St. Paul Mercury, the "Excess Policy Insurers"),² that they are authorized to make a settlement payment in the amount of \$8,250,000 (the "Settlement Amount") in connection with a settlement agreement between the State of New Jersey, Department of Treasury, Division of Investment ("New Jersey") and the Insured Persons, in the action *The State of New Jersey, Department of Treasury, Division of Investment v. Richard S. Fuld, Jr., et al.*, 10 Civ. 05201 (LAK), pending in the United States District Court for the Southern District of New York (the "New Jersey Action"), without concern that, if the automatic stay is otherwise applicable, they are violating the automatic stay.

2. For Claims³ made against individual Insureds during the period from May 16, 2007 to May 16, 2008 (the "Policy Period"), the Debtors purchased a primary D&O insurance policy from XL Specialty Insurance Company ("XL," and said policy the "2007-2008 Primary D&O Policy") plus additional excess insurance coverage for this period from a number of other carriers of up to \$250 million in the aggregate. The excess policies, including the policies of the Excess Policy Insurers (the "Excess Insurance Policies"), are all "follow form" policies governed by the terms, conditions, limitations and exclusions of the 2007-2008 Primary

² Copies of the primary D&O Policy, together with the ACE Bermuda and St. Paul Mercury policies (among others), were attached to the *Debtors' Motion Pursuant to Section 362 of the Bankruptcy Code, For An Order Modifying the Automatic Stay To Allow Advancement Under (I) 2007 2007-2008 Directors And Individual Defendants Insurance Policies By Zurich American Insurance Company, Ace Bermuda Insurance Ltd. And St. Paul Mercury Insurance Company, And (II) 2008-2009 Directors And Individual Defendants Insurance Policies By XL Specialty Insurance Company And Federal Insurance Company* [Docket No. 12369] (the "Zurich Comfort Motion"), and are incorporated herein by reference.

³ Capitalized terms that are used but not otherwise defined herein shall have the meanings ascribed to them in the Excess Insurance Policies.

D&O Policy, and subject to additional independent terms and conditions set forth in the Excess Insurance Policies, such as Limits of Liability, and attach only after all Loss within the respective Limits of Liability of the underlying policies have been paid.

3. Confirming the Excess Policy Insurers' ability to make the proposed settlement payment is in the best interests of the Debtors' estates and creditors because, *inter alia*, the interests of the Debtors' estates, if any, in the proceeds of the Excess Insurance Policies are expressly subordinate to the interest of the individual Insureds. Specifically, the Excess Insurance Policies provide that the Debtors have a right to the insurance proceeds only after the individual Insureds are fully reimbursed for any "Loss," including defense costs and settlement payments. As such, granting the relief requested by this Motion is unlikely to have any adverse effect on the Debtors' estates and creditors. Moreover, validating that the Excess Policy Insurers are authorized to fund certain settlement payments without violating the automatic stay will also eliminate or reduce potential indemnification claims that may be asserted against the Debtors. Accordingly, granting the relief requested herein is in the best interest of the Debtors' estates and creditors.

Background

4. Commencing on September 15, 2008 and periodically thereafter (as applicable, the "Commencement Date"), LBHI and certain of its subsidiaries commenced voluntary cases under chapter 11 of the Bankruptcy Code (the "Chapter 11 Cases"). The Debtors' Chapter 11 Cases have been consolidated for procedural purposes only and are being jointly administered pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). The Debtors are authorized to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

5. On September 17, 2008, the United States Trustee for the Southern District of New York (the “U.S. Trustee”) appointed the statutory committee of unsecured creditors pursuant to section 1102 of the Bankruptcy Code (the “Creditors’ Committee”).

6. On September 19, 2008, a proceeding was commenced under the Securities Investor Protection Act of 1970 (“SIPA”) with respect to Lehman Brothers Inc. (“LBI”). A trustee appointed under SIPA is administering LBI’s estate.

7. On July 1, 2011, the Debtors filed a second amended joint chapter 11 plan and disclosure statement [Docket Nos. 18204 and 18205].

8. The New Jersey Action was originally filed in New Jersey state court, captioned *The State of New Jersey, Department of Treasury, Division of Investment v. Richard S. Fuld, Jr., et al.*, Case No. MER-L-677-09 (Superior Court of New Jersey, Law Division, Mercer County). The action was subsequently removed to the U.S. District Court for the District of New Jersey, in an action captioned *The State of New Jersey, Department of Treasury, Division of Investment v. Richard S. Fuld, Jr., et al.*, No. 09-cv-1629 (AET) (D.N.J.). It was then transferred to the U.S. District Court for the Southern District of New York (“District Court”) pursuant to a transfer order from the Judicial Panel on Multidistrict Litigation, in an action captioned *The State of New Jersey, Department of Treasury, Division of Investment v. Richard S. Fuld, Jr., et al.*, No. 10-cv-05201-LAK (S.D.N.Y.). The action was then coordinated with the master MDL case, *In re: Lehman Brothers Securities and ERISA Litigation*, Master Docket No. 09 MD 2017 (LAK) (S.D.N.Y.), for pretrial proceedings. A First Amended Complaint was filed in the New Jersey Action on or about April 13, 2011.

9. The settlement agreement between New Jersey and the Insured Persons is conditioned upon, *inter alia*, the Bankruptcy Court entering a Final order authorizing relief from the automatic stay.

Jurisdiction

10. This Court has subject matter jurisdiction to consider and determine this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

Relief Requested

11. The Insured Persons seek the entry of an order granting relief from the automatic stay provided for in section 362(a) of the Bankruptcy Code, to the extent that it applies, to allow the Excess Policy Insurers to pay the Settlement Amount of \$8,250,000 solely from the available proceeds of the Excess Insurance Policies in accordance with the terms of a settlement agreement (the “Settlement Agreement”) between New Jersey and the Insured Persons (together, the “New Jersey Settling Parties”), subject to the terms of the Excess Insurance Policies.

Waiver of Bankruptcy Rule 4001(A)(3)

12. As the proceeds of the D&O Policies are finite and, as this Court has observed, these finite proceeds of the D&O Policies may be claimed on a first-come, first-served basis, the Insured Persons request that the Court waive the requirements of Bankruptcy Rule 4001(a)(3) and direct that the order granting the requested relief be effective immediately.

The Debtors’ Directors and Officers Liability Insurance Policies

13. Pursuant to, *inter alia*, their advancement and indemnification obligations expressed in their by-laws and certificate of incorporation, the Debtors purchased primary and excess directors’ and officers’ liability (“D&O”) insurance, which provides coverage for the

Debtors' current and former officers, directors, and employees in connection with civil, criminal, regulatory and other actions and investigations.

14. Subject to the terms, conditions, limitations and exclusions of the Excess Insurance Policies, the Excess Policy Insurers cover Loss (defined as Defense Expenses, settlements and judgments, among other things) of \$40 million in excess of \$85 million incurred as a result of Claims made during the Policy Period for Wrongful Acts allegedly committed by individual Insureds Persons in their capacity as directors, officers, and/or employees of LBHI and certain of its subsidiaries.⁴ Coverage under Insuring Agreement (A) ("Side A") of the Excess Insurance Policies is immediately available to Insured Persons under the Excess Insurance Policies for any Loss resulting from Claims made against them that cannot be advanced or indemnified by the Debtors by reason of their financial insolvency.

15. Furthermore, the Excess Insurance Policies contain "Priority of Payments" provisions, which provide that when competing claims for coverage under both Insuring Agreement (A) for non-indemnifiable loss, as described above, and Insuring Agreement (B) are made under the Excess Insurance Policies, "the Insurer shall pay that Loss, if any, which the Insurer may be liable to pay on behalf of the Insured Persons under Insuring Agreement (A)...". Thus, the Excess Insurance Policies, by virtue of Insuring Agreement (A) and the Priority of Payments provisions, provide for the immediate payment of the Settlement Amount on behalf of the individual Insureds ahead of any payment that may be made to the Debtors.

⁴ As the sixth excess insurer for the Policy Period, ACE Bermuda provides coverage of \$25 million in excess of \$85 million. As the seventh excess insurer for the Policy Period, St. Paul Mercury Insurance Company subscribing to policy number 590CM2698 ("St. Paul Mercury") provides coverage of \$15 million in excess of \$110 million.

The Action

16. Both prior to and after the collapse of the Lehman enterprise in September 2008, various securities actions were commenced against certain current and former officers and directors of Lehman in both federal and state courts.

17. Plaintiff in the New Jersey Action is the State of New Jersey, Department of Treasury, Division of Investment. According to its Amended Complaint, the Division of Investment is one of the largest managers of public pension funds in the United States, and manages investments for at least seven major retirement systems for New Jersey public employees.

18. The New Jersey Action alleges, *inter alia*, misrepresentations and omissions in Lehman offering materials and/or securities filings, and asserts claims for violations of the Securities Act of 1933 and for violations of New Jersey statutory and common law seeking approximately \$192 million in damages. *The State of New Jersey, Department of Treasury, Division of Investment v. Richard S. Fuld, Jr., et al.*, 10 Civ. 05201 (LAK), [Docket No. 89], Am. Compl. ¶ 1.

19. Neither LBHI nor any of the other Debtors is named as a defendant in the New Jersey Action and none of the Debtors are party to the settlements.

The Settlement Agreement

20. In connection with the New Jersey Action, to eliminate the uncertainties, burden, and expense of further litigation, without any admission or concession of any fault, liability, or wrongdoing, the New Jersey Settling Parties, through arms-length negotiations, have agreed to settle all disputes outstanding between them under the terms and conditions set forth in

the Settlement Agreement and a supplemental stipulation. The relevant terms of the Settlement Agreement and supplemental stipulation, as they relate to the Debtors, are as follows:⁵

- (i) the effectiveness of the Settlement Agreement is subject to entry of an order in the Chapter 11 Cases granting relief from the automatic stay to permit the Excess Policy Insurers to pay the Settlement Amount;
- (ii) payment of the Settlement Amount of \$8,250,000 into an escrow account within ten days following the entry of an order in the Chapter 11 Cases granting the requested relief from the automatic stay;
- (iii) payment of the Settlement Amount of \$8,250,000 from the escrow account to New Jersey within a specific time period following the entry of (a) a final order granting the requested relief from the automatic stay, and (b) a final order barring claims for contribution or indemnification against any Insured Person and the other Releasees based upon, arising from, relating to, or in connection with the New Jersey Released Claims;
- (iv) dismissal of New Jersey's prior bankruptcy appeal that was commenced on July 20, 2011 [Docket No. 18676] pursuant to the Stipulation Dismissing Appeal filed on July 29, 2011 [Docket No. 18901];
- (v) the exchange of certain documents and financial information; and
- (vi) mutual releases between New Jersey and the Insured Persons and other releasees and dismissal with prejudice of all claims against the Insured Persons.

Cause Exists to Grant the Relief Requested

21. Pursuant to the Prior Stay Orders, this Court has granted the relief sought in this Motion, based on rights and obligations *vis-à-vis* the Debtors and the Insured Persons that are governed by the same terms and conditions as the as the Excess Insurers Policies.

Accordingly, because cause to modify the automatic stay was found to exist under the Prior Stay Orders, *a fortiori*, such cause exists here as well. If, however, the Insured Persons must

⁵ To the extent there is an inconsistency between this summary and the Settlement Agreement, the terms of the Settlement Agreement shall control. A copy of the Settlement Agreement has not been attached to this Motion because the Debtors are not parties thereto and the provisions thereof that are relevant to the Debtors are those described in paragraph 20 hereof with respect to the payment of the Settlement Amount from proceeds of the Excess Insurance Policies.

independently demonstrate that such cause exists to allow the Excess Policy Insurers to pay the Settlement Amount, as described below, it is beyond peradventure that such a modification of the automatic stay is warranted.

A. The Proceeds Are Not Property of the Estate

22. Section 362(a)(3) of the Bankruptcy Code provides for an automatic stay of any action seeking to obtain possession or exercise control over property of the bankruptcy estate. It is well settled that insurance policies are property of the estate and covered by the automatic stay provisions of the Bankruptcy Code. *See MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir 1988). However, courts have distinguished between ownership of a policy and ownership of the *proceeds* of a policy. While courts have not been uniform in their analysis, where a policy provides for payment only to a third party – such as payments to officers and directors under an executive insurance policy – or where the debtor has a right of coverage or indemnification, but such right is hypothetical or speculative, courts have held that the proceeds of such policy are not property of the bankruptcy estate. *See, e.g., In re Adelphia Commc'ns Corp.*, 298 B.R. 49, 53 (S.D.N.Y. 2003) (holding that insurance proceeds were not property of the estate where it had not been suggested that debtors had made any payment for which they may be entitled to indemnification under policy or that any such payments were then contemplated); *In re Allied Digital Techs., Corp.*, 306 B.R. 505, 510 (Bankr. D. Del. 2004) (holding that proceeds of D&O insurance policy were not property of the estate where debtor's indemnification right under the policy was speculative and direct coverage of debtor under policy was hypothetical); *In re La World Exposition, Inc.*, 832 F.2d 1391, 1401 (5th Cir. 1987) (holding that proceeds of a D&O policy belonged only to the officers and directors and, therefore, were not property of the estate); *In re World Health Alternatives, Inc.*, 369 B.R. 805, 809 (Bankr. D. Del. 2007) (when proceeds of a policy are payable to the directors and officers

and not the estate, the proceeds are not property of the estate); *See In re First Cent. Fin. Corp.*, 238 B.R. 9, 18 (Bankr. E.D.N.Y. 1999) (holding that circumstances that may give rise to entity coverage were highly remote and therefore proceeds were not property of estate).

23. In determining whether proceeds are property of the estate, courts review the “language and scope of the policy at issue.” *Allied Digital*, 306 B.R. at 509. See also *In re CyberMedica, Inc.*, 280 B.R. 12, 16 (Bankr. D. Mass. 2002); *In re Jones*, 179 B.R. 450, 455 (Bankr. E.D. Pa. 1995) (respective rights of debtors and non-debtors to insurance proceeds “must be ascertained by reference to the parties’ contractual rights pursuant to the interpretation of the pertinent contractual provisions under applicable state law”).

24. The Excess Insurance Policies contain an unambiguous priority of payments endorsement that expressly subordinate any potential rights of the Debtors to proceeds payable under the Excess Insurance Policies to the rights of the individual Insureds. The priority of payment endorsements is an enforceable contractual provision and should be upheld for the benefit of the individual Insureds as intended. *See In re Enron Corp.*, Case No. 01-16034 (Bankr. S.D.N.Y. Apr. 11, 2002) [Docket No. 3278] (holding that priority of payment provision was an enforceable contractual right).⁶

25. Consistent with the purpose of such policies, the Debtors purchased the Excess Insurance Policies primarily to provide insurance coverage to their officers and directors, including the Insured Persons. *See In re First Cent. Fin. Corp.*, 238 B.R. 9, 16 (Bankr. E.D.N.Y. 1999) (“In essence and at its core, a D&O Policy remains a safeguard of officer and director interests and not a vehicle for corporate protection.”). The Debtors’ speculative rights to any residual proceeds, which would be payable only in the event that the Debtors indemnified the

⁶ A copy of the Court’s bench ruling in *Enron* is attached hereto at Exhibit A.

individual Insureds and which are subject to an express contractual subordination provision, should not alter the conclusion that the proceeds should not constitute property of the Debtors' estates.

B. Cause Exists to Modify the Automatic Stay, to the Extent
That it Applies, to Allow Payment of the Settlement Amount.

26. Even if the proceeds from the Excess Insurance Policies are determined to be property of the estate, "cause" exists under section 362(d)(1) of the Bankruptcy Code to modify the automatic stay to allow for the payment of the Settlement Amount as required under the Excess Insurance Policies. It is not uncommon for courts to grant stay relief to allow payment of settlement costs to directors and officers, especially when there is no evidence that direct coverage of the debtor will be necessary. *See Allied Digital*, 306 B.R. at 513.

27. Allowing the Excess Policy Insurers to pay the Settlement Amount will, in fact, benefit the Debtors' estates. The Debtors have an obligation under their by-laws to advance the settlement costs incurred by the individual Insureds, including the Insured Persons. If the Excess Policy Insurers are barred from advancing the Settlement Amount due to the enforcement of the automatic stay, the Insured Persons may assert indemnification claims against the Debtors for such amounts.⁷ Consequently, payment of the Settlement Amount under the Excess Insurance Policies will reduce or eliminate the claims that the Insured Persons could assert against the Debtors.

⁷ Many of the Insured Persons have filed protective claims against LBHI for indemnification and advancement of defense costs (*See, e.g.*, Proof of Claim Nos. 4645, 4646, 4860, 7388, 7389, 7390, 7391, 7392, 32550 [Mr. Gregory]; 12843 [Mr. Goldfarb]; 13060 [Mr. Russo]; 16194 [Mr. Fuld]; 19433 [Mr. O'Meara]; 24721 [Mr. McDade]; 29624 [Mr. Walsh]; 66183 [Mr. Hernandez]; 66184 [Mr. Macomber]; 66185 [Mr. Cruikshank]; 66188 [Mr. Kaufman]; 66189 [Ms. Evans]; 66192 [Mr. Akers]; 66193 [Mr. Ainslie]).

28. Modifying the automatic stay will not harm the Debtors' estates. As explained above, any rights the Debtors have to the proceeds are contractually subordinated to the rights of the individual Insureds pursuant to the priority of payments clause.

29. Alternatively, if this Court finds that the Debtors have some interest in the proceeds of the Excess Insurance Policies, the Insured Persons submit that any such interest is nominal and in any event cannot be determined until the Insured Persons' losses have been quantified and paid. Accordingly, cause exists to modify the automatic stay pursuant to section 362(d) of the Bankruptcy Code, to the extent it applies, to allow the Excess Policy Insurers to make payment of the Settlement Amount pursuant to the terms of the Settlement Agreement and subject to the terms of the Excess Insurance Policies.

30. In making this Motion, neither the Debtors, the Insured Persons, nor the Excess Policy Insurers are waiving any of their respective rights under the Excess Insurance Policies or any other insurance policy. In addition, the Insured Persons are not seeking a determination of the Excess Policy Insurers' obligation to pay any settlement costs under the Excess Insurance Policies. Rather, the Insured Persons seek only the entry of an order modifying the automatic stay, to the extent applicable, to allow the Excess Policy Insurers to make payment of the Settlement Amount.

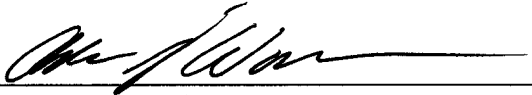
Notice

31. No trustee has been appointed in these cases. The Insured Persons have served notice of this Motion in accordance with the procedures set forth in the second amended order entered on June 17, 2010, governing case management and administrative procedures for these cases [Docket No. 9635] on (i) the U.S. Trustee; (ii) the attorneys for the Debtors; (iii) the attorneys for the Creditors' Committee; (iii) attorneys for New Jersey; (iv) the Securities and Exchange Commission; (v) the Internal Revenue Service; (vi) the United States Attorney for the

Southern District of New York; (vii) all parties who have requested notice in these chapter 11 cases; and (viii) attorneys for ACE Bermuda and St. Paul Mercury. The Insured Persons submit that no other or further notice need be provided.

WHEREFORE the Insured Persons respectfully request that the Court grant the relief requested herein and such other and further relief as is just.


Dated: August 24, 2011
New York, New York



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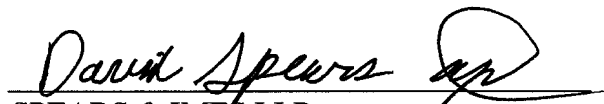
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EXHIBIT A

(*Enron* Bench Ruling)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

In the Matter of:

ENRON CORP., ET AL.,

Case No.

01-16034

Debtor.

-----x

April 11, 2002

2:00 p.m.

United States Custom House

One Bowling Green

New York, New York

B E F O R E:

HON. ARTHUR J. GONZALEZ, U.S. BANKRUPTCY JUDGE

Ruling in reference to: One, the schedules; two,
exclusivity; and three, the D&O insurance issue

Reported by:

Linda D. Noto, RPR, CSR

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1 ENRON CORP., ET AL.,

2 THE COURT: Please be seated.

3 All right. My recollection, if I
4 left something out I'll have to go back in and get
5 some more papers, but my recollection is that
6 there are three decisions I have to read into the
7 record: One, the schedules; two, exclusivity; and
8 three, the D&O insurance issue.

9 Was there anything else that I
10 reserved on this morning?

11 All right. I'll deal first with
12 exclusivity and then I'll read a decision with
13 respect to the D&O. And when I deal with
14 exclusivity, I'll deal as well with the schedules.

15 Cause exists to extend the Debtors
16 exclusive periods as to all the Debtors.

17 With respect to ENA, the Court will
18 do the following: One, extend ENA's exclusive
19 period to August 31st, 2002; two, sua sponte
20 expand the ENA Examiner's role to that of the
21 facilitator of a plan in the ENA case and direct
22 him to file a report regarding the status of those
23 efforts including a recommendation as to any
24 further extension of ENA's exclusivity; three,
25 such report shall be filed on or before July 26,

1 ENRON CORP., ET AL.,
2 2002.

3 With respect to the other Enron
4 Debtors, the exclusive period is extended as
5 requested by the Debtor and the Committee for the
6 six-month period sought.

7 With respect to the schedules, the
8 Court grants the Debtors' request for the
9 additional 60 days and the related relief sought.
10 And the Debtor is to serve an order with respect
11 to both of those issues, and obviously settle it
12 upon the ENA Examiner with respect to the
13 exclusivity issue.

14 Regarding the AEGIS motion and the
15 outside directors. Concerning the motions filed
16 by AEGIS and the outside directors to lift the
17 automatic stay to allow AEGIS to pay amounts under
18 the AEGIS D&O Policy and the AEGIS Fiduciary and
19 Employee Benefit Liability Policy, first, as set
20 forth by the Movants, their motion to lift the
21 stay is the procedurally correct method to have
22 this matter presented to the Court.

23 Therefore, currently at issue is
24 the payment of the defense costs incurred by the
25 officers and directors.

1 ENRON CORP., ET AL.,

2 The D&O Policy provides for
3 coverage of the directors and officers,
4 indemnification coverage for the Debtor, and
5 entity coverage for the Debtor.

6 Pursuant to the terms of the D&O
7 Policy, the directors have a right to advancement
8 of defense costs under a priority of payments
9 endorsement.

10 The Debtors' entity coverage and
11 its indemnification coverage are expressly
12 subordinated to the rights of the directors and
13 officers under the AEGIS D&O policy.

14 As the Debtors' property rights are
15 defined by state law, it is that law that governs
16 the contractual obligation; thus, any directors
17 and officers currently due defense costs covered
18 by the policy must be paid from the proceeds of
19 the policy first. The Debtors are then entitled
20 to have their own claims for defense costs paid.

21 The Debtors note the importance of
22 providing the officers and directors with this
23 type of coverage. The Debtors assert that the
24 Debtor, itself, is entitled to currently-due
25 defense costs and will seek payment once the

1 ENRON CORP., ET AL.,
2 directors and officers receive payments for the
3 amounts currently due them.

4 With respect to the payment of
5 officers and directors' defense costs, to the
6 extent that any such payments would negatively
7 impact the Debtors' interest in the proceeds of
8 the D&O policy, that result is dictated by the
9 negotiated terms of the policy.

10 As certain officers and directors
11 may have present rights to payment of defense
12 costs, the fact that certain parties may in the
13 future assert claims and potentially become
14 entitled to payment from the insurance policies
15 does not preclude those who are currently entitled
16 to payment from receiving it.

17 In any case, the parties are bound
18 by the contractual provisions of the policy. The
19 Debtors' interest in the policy is limited by its
20 contractual provisions including a priority
21 advancement and payment obligations contained in
22 those policies. The Court cannot rewrite the
23 provisions of the contract.

24 The Objectants acknowledge the
25 terms of the contract. Some of the Objectants

1 ENRON CORP., ET AL.,
2 argue that because AEGIS and the outside directors
3 are seeking to invoke this Court's jurisdiction
4 concerning the lifting of the stay, that gives
5 this Court leeway to set conditions upon which the
6 stay would be lifted. However, in this case, any
7 such action would result in changing the terms of
8 the contract.

9 The Court finds that, while
10 exercising jurisdiction concerning the issue of
11 lifting the stay, it should not exercise
12 jurisdiction over the terms of the contract and
13 will not interfere with those terms.

14 Under the AEGIS Fiduciary Policy,
15 the coverage afforded the relevant Debtors is
16 co-extensive with the coverage afforded the
17 individual insureds. However, that policy
18 provides a special \$10 million fund earmarked for
19 defense costs.

20 Payment from that fund will protect
21 the coverage that is available for payment of
22 settlements and judgements. Moreover, payment
23 from the special funds requires written approval
24 from the Debtor. These two aspects protect the
25 Debtors' interest.

1 ENRON CORP., ET AL.,

2 In addition, the Debtors have
3 referenced the estates' interest in having
4 individual defendants vigorously defend themselves
5 in light of the potential for vicarious liability.

6 The Debtors also have asserted that
7 the payment of the individual claimants' defense
8 cost from the special \$10 million fund should not
9 limit the availability of proceeds that may be
10 required by the Debtor.

11 Based upon the pleadings filed and
12 the record of this hearing, the Court finds that
13 because of the entity coverage, the stay is
14 implicated. However, the Debtors' interest appear
15 minimal.

16 Moreover, the Debtors' interest
17 should not be expanded by this Court. They should
18 receive no greater protection than their contract
19 rights afford them.

20 The Court finds cause to lift the
21 stay and grant the motion to permit the parties to
22 exercise their contractual rights under the D&O
23 Policy.

24 In addition, the Court grants the
25 motion to lift the automatic stay to the extent

1 ENRON CORP., ET AL.,
2 that the individual insureds and the Debtors may
3 exercise their contractual rights against the
4 \$10 million special fund portion of the Fiduciary
5 Policy.

6 The Movants shall settle an order
7 upon the appropriate parties.

8 We will begin again, I think, at
9 2:30. Thank you.

10

11 (Time noted: 2:05 p.m.)

12 oOo

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C E R T I F I C A T E

STATE OF NEW YORK)

) SS.:

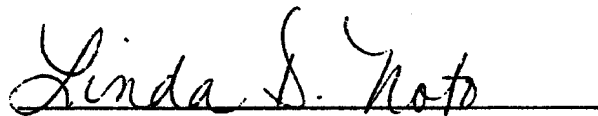
COUNTY OF NEW YORK)

I, LINDA D. NOTO, a Certified
Shorthand Reporter, Registered
Professional Reporter and Notary Public
within and for the State of New York, do
hereby certify:

I reported the proceedings in the
within entitled matter, and that the
within transcript is a true record of
such proceedings.

I further certify that I am not
related, by blood or marriage, to any of
the parties in this matter and that I am
in no way interested in the outcome of
this matter.

IN WITNESS WHEREOF, I have hereunto
set my hand this 11th day of April, 2002.



LINDA D. NOTO, C.S.R., R.P.R.

License Number XI 01887 - N.J.

License Number 001002 - N.Y.